

**Before the
Federal Communications Commission
Washington DC 20554**

In the Matter of:

)	
Request for Review or Waiver of a Decision)		
of the Schools and Libraries Division)	Administrator Letter Dated September 4, 2012	
from Tomball Indep. School District)		
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6	
Support Mechanism)		

Request for Review or Waiver

In accordance with Sections 54.719 through 54.721 of the Commission's Rules, Tomball Independent School District, Tomball, Texas (Tomball) requests Federal Communications Commission (Commission) review or waiver of a Commitment Adjustment (COMAD) by the Universal Service Administrative Company (Administrator). This request comes before the Commission in a timely manner from the Administrator letters dated September 4, 2012.

Applicant:

Tomball Independent School District
FCC Registration Number: 0005901962
BEN: 141267
Form 471 Number: 662227
Funding Request Numbers: 1808544, 1808541

Vendors: Comcast Business Communications, SPIN 143003990
Southwestern Bell Telephone Company, SPIN 143004662

Background

Tomball was contacted by the Administrator Internal Audit Division (IAD) to audit Tomball's 2009 E-Rate application. As a result of the audit, the IAD concluded that Tomball did not

comply with local and state procurement laws for the two FRN here under appeal. Tomball provided evidence that one FRN was procured under a state master contract and did comply with state and local procurement regulations. The IAD did not agree with Tomball and the Administrator upheld the IAD decision resulting in a COMAD of all disbursed funding for these FRN.

Tomball provided additional information indicating the services for FRN 1808541 was covered under a state master contract that complied with the Commission's E-Rate competitive bidding regulations because a third party had posted an FCC Form 470 prior to selecting the contract.

Discussion

Tomball is utterly mystified that the Administrator could conclude a violation of state and local procurement laws occurred when securing these services. For FRN 1808541, Tomball utilized a state master contract in accordance with state and local law. The master contract Tomball cited was competitively bid and complied with E-Rate regulations with the posting of a Form 470 by a third party. Tomball posted a separate Form 470 and elected to continue service under the master contract after no responses were received for service. The contract itself was not only a state master contract but a contract that complied with the Commission's E-Rate competitive bidding requirements.

The Commission has stated categorically in numerous appeal decisions that if a master contract complies with the Commission's competitive bidding requirements, applicants may utilize the contract for E-Rate discounts:

Applicants may purchase eligible services from "master contracts" negotiated by a third party such as a governmental entity. The third party initiating the master contract must comply with the Commission's competitive bidding requirements and state procurement laws. The applicant is not required to satisfy the competitive bidding requirements if it takes service from a master contract that either has been competitively bid or qualifies for the existing contract exemption.¹

The Administrator concluded that even though Tomball utilized a master contract, by posting an individual Form 470, Tomball was compelled to advertise in a local paper before selecting a master contract. This conclusion is absolutely contrary to the Coahoma decision and many others. If a state master contract complied with E-Rate procurement regulations by posting a Form 470, all applicants could utilize the contract without additional competitive bidding. The contract was thus eligible for E-Rate funding for all covered applicants. Period. If an applicant files an individual Form 470 to seek services and ultimately selects a master contract that already meets the Commission's competitive bidding regulations, the applicant may utilize that contract in spite of its individual Form 470 filing. The individual Form 470 was moot by the fact the contract was already E-Rate eligible. If the Administrator discovered a Form 470 had been filed by the third party responsible for a master contract, the Form 470 number could be changed during application review. Similarly, the Administrator should be able to correct the Form 470 number during an audit because the master contract is, in fact eligible for E-Rate discounts. More disturbing, the Administrator concluded that Tomball should have complied with local posting requirements when securing services under a master contract when posting an individual form 470. When making this conclusion, the Administrator has grossly overstepped its authority and in violation of Commission regulation and precedent. Commission regulations state: "These

¹ Coahoma County School District, DA 11-1369, rel. August 8, 2011 at 4.

competitive bid requirements apply in addition to state and local competitive bid requirements and **are not intended to preempt such state or local requirements.**”² (emphasis added).

Without question, the Administrator and IAD agree that Tomball may purchase from a valid master contract without competitive bidding and remain in compliance with Tomball and Texas procurement law. When purchasing from a valid master contract Tomball and Texas procurement law do not require RFP’s, newspaper advertisements, telephone bids, or other common procurement requirements. Indeed, the very purpose of master contracts and cooperative purchase arrangements is to provide small entities with competitively bid contracts that will save public dollars and eliminate the need for robust procurement departments and costly newspaper ads and RFPs.

To be E-Rate eligible, a master contract that did not have a Form 470 filed by the third party letting the contract must have a Form 470 filed by the individual applicant. The applicant may use the master contract as a response to the Form 470 posting. If the master contract is the most cost effective, with price being the primary consideration, the applicant may memorialize the contract and receive E-Rate discounts on the master contract until it expires.

With language in this decision, the Administrator has concluded that ALL individual Forms 470 must comply with every nuance of state and local procurement regulation, even if a master contract is ultimately used. **This conclusion is absolutely contrary to the Commission’s stance that E-Rate will not preempt local procurement regulations and will pose a huge burden on small and insular applicants who rely on master contracts to secure affordable service.**

² § 54.503(b)

For FRN 1808544 Tomball asks the Commission to waive any minor violation of procurement posting requirement in accordance with the Aberdeen decision.³ This FRN complied with the Commission's competitive bidding requirements and had a cost below \$25,000 from the applicant.

Should the Commission find that both FRNs truly violated the Texas Education Code, we again ask for a waiver from the Commission simply based upon the scope and nature of the violation. We find it **very** troubling that the Administrator ignored the purpose of the Purchasing Regulation (the newspaper advertisement) and simply concluded that failing to file the newspaper advertisement not only resulted in a violation of the Commission's rules, but resulted in a material violation that requires the full repayment of almost \$70,000.

The Administrator alleges Tomball violated Section 44.031, subsection (g) of the Texas Education Code. That subsection reads in its entirety as such⁴:

(g) Notice of the time by when and place where the bids or proposals, or the responses to a request for qualifications, will be received and opened shall be published in the county in which the district's central administrative office is located, once a week for at least two weeks before the deadline for receiving bids, proposals, or responses to a request for qualifications. If there is not a newspaper in that county, the advertising shall be published in a newspaper in the county nearest the county seat of the county in which the district's central administrative office is located. In a two-step procurement process, the time and place where the second-step bids, proposals, or responses will be received are not required to be published separately.

This subsection simply requires a newspaper advertisement that lists the time, date and location of the bid opening. No other information is required by this subsection. The subsection does not

³ Aberdeen School District, DA 12-248, rel. February 22, 2012 (44 appeals)

⁴ <http://www.statutes.legis.state.tx.us/Docs/ED/htm/ED.44.htm#44.031>

require the District to list what the project is, what the scope of the project may be nor any other details that would help potential vendors identify what services are requested and if they offer those types of services. We see no evidence that subsection (g) does anything to further any Commission goal for the competitive bidding process.

Should the Commission find that Section 44.031 subsection (g) has been violated, and that Tomball should have indeed filed the newspaper advertisement, we argue that such a violation would not rise to the level of a material violation of the program rules requiring Tomball to pay back almost \$70,000 of funding, but rather a non-material (procedural) violation which would require Tomball to develop and submit a compliance plan to the Administrator explaining exactly how they will comply with this subsection in the future. We note that this process is already in effect – the Administrator has instructed us to submit this compliance plan within six months of their findings. We have also been informed that the Administrator will take no action on any future funding requests from Tomball until that plan has been approved by USAC.

The Administrator, during this very thorough audit, examined all aspects of the Competitive Bidding Process that was utilized by Tomball and found that all Federal FCC rules were complied with, and that the process was open and fair (bids were evaluated correctly using price as the primary factor, no improper vendor involvement). No allegations of fraud or abuse were ever made during this audit. Simply put, failing to advertise in a local newspaper the time and place of bid opening could have in no way compromised the competitive bidding process to such a degree that would require the harshest penalty possible - full repayment of the disbursed funds. We ask that the Commission instruct the Administrator to cease collection of funds disbursed for

these two FRNs, and continue with their efforts to collect and review Tomball's pending Compliance Plan.

Conclusion

Tomball complied with all federal, state, and local procurement regulations when securing these services. The services were necessary and essential for the efficient operation of the school district. The services were reasonably priced through master contracts and determined to be cost effective as a result of the IAD audit. Tomball did not waste or abuse program resources or defraud the E-Rate program with these fund requests.

Alternatively, and in the public interest, Tomball asks the Commission to waive any minor violations of program rules in accord with the Aberdeen decision and given the nature/scope of the violation.

Respectfully submitted this 2nd Day of November:

/S/

Chris Webber
Owner
CRW Consulting
PO Box 701713
Tulsa, OK 74170
V: 918.445.0048
F: 918.445.0049
chris@crwconsulting.com

ATTACHMENT 1 OF 1
USAC AUDIT REPORT

To: Mel Blackwell, Vice President, Schools and Libraries Division

From: Wayne Scott, Vice President, Internal Audit Division

Date: May 24, 2012

**Re: Independent Auditor's Report on Tomball Independent School District's
Compliance with Schools and Libraries Support Mechanism Rules (USAC Audit
No. SL2011BE026)**

Introduction

The Universal Service Administrative Company (USAC) Internal Audit Division (IAD) performed an audit of Tomball Independent School District (Beneficiary), Billed Entity Number (BEN) 141267, for compliance with the regulations and orders governing the Schools and Libraries Support Mechanism, set forth in 47 C.F.R. Part 54, as well as other program requirements (collectively, the Rules). Compliance with the Rules is the responsibility of the Beneficiary's management. USAC IAD's responsibility is to express a conclusion on the Beneficiary's compliance with the Rules based on our audit.

The Beneficiary is a public school district located in Tomball, Texas that serves over 9,700 students.

Purpose and Scope

The purpose of our audit was to determine whether the Beneficiary complied with the Rules. We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards (GAGAS) issued by the Comptroller General of the United States (2007 Revision).¹ Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our objectives. Our audit included examining, on a test basis, evidence supporting the competitive bidding process undertaken to select a service provider, data used to calculate the discount percentage and the type and amount of services received, as well as performing other procedures we considered necessary to form a conclusion. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our objectives.

¹ See Government Accountability Office, "Government Auditing Standards: July 2007 Revision," GAO-07-731G (July 2007).

The following chart summarizes the Schools and Libraries Program support amounts committed and disbursed to the Beneficiary for Funding Year 2009 (audit period):

Service Type	Amount Committed	Amount Disbursed
Internet Access	\$16,560	\$16,560
Telecommunications	\$125,716	\$106,474
Total	\$142,276	\$123,034

The committed total represents one FCC Form 471 application with eight Funding Request Numbers (FRNs). We selected two of the FRNs, which represent \$69,692 of the funds disbursed during the audit period, to perform the procedures enumerated below with respect to the Funding Year 2009 application submitted by the Beneficiary.

Our procedures were performed to determine whether the Beneficiary complied with the Rules. For the purposes of this report, a finding is a condition that shows evidence of noncompliance with the Rules.

Conclusion

USAC IAD concludes that the Beneficiary was not compliant with the Rules for the period examined. Our examination disclosed one finding. A summary of the results and procedures are included below.

Finding

- Failure to comply with competitive bidding requirements.

Exception Taken and Recovery Action

Finding	Monetary Effect of Finding	USAC Management Recovery Action
#1 Failure to comply with competitive bidding requirements	\$69,692	\$69,692
Total Net Monetary Effect	\$69,692	\$69,692

Audit Procedures, Findings, and Responses

A. Application Process

We obtained an understanding of the Beneficiary's processes relating to the Schools and Libraries Program. Specifically, we examined documentation to support its effective use of funding and that adequate controls exist to ensure funds were used in accordance with the Rules. We used inquiry and inspection of documentation to ensure the Beneficiary was eligible to receive funds and had the necessary

infrastructure to support the services for which funding was requested. We also used inquiry to obtain an understanding of the process the Beneficiary used to calculate its discount percentage and validated its accuracy.

We obtained and examined documentation to determine whether the Beneficiary complied with the Schools and Libraries Program Children's Internet Protection Act (CIPA) requirements. Specifically, we obtained and evaluated the Beneficiary's Internet Safety Policy. We obtained an understanding of the process by which the Beneficiary communicated and administered the policy.

B. Competitive Bid Process

We obtained and examined documentation to ensure that all bids received were properly evaluated and price was the primary factor considered. We also obtained and examined evidence that the Beneficiary waited the required 28 days from the date the FCC Form 470 was posted on USAC's website before signing contracts or executing month-to-month agreements with the service providers. We evaluated the services requested and purchased for cost effectiveness as well.

C. Invoicing Process

We reviewed invoices for which payment was disbursed by USAC to determine that the services claimed on the FCC Form 472 Billed Entity Applicant Reimbursements (BEARs), FCC Form 474 Service Provider Invoices (SPIs), and corresponding service provider bills were consistent with the terms and specifications of the service provider agreements. We also examined documentation to ensure the Beneficiary paid its non-discounted share in a timely manner.

D. Beneficiary Location

We used inquiry to determine whether the services were located in eligible facilities and utilized in accordance with the Rules. We evaluated whether the Beneficiary had the necessary infrastructure to support the services for which funds were requested. We also evaluated the services purchased by the Beneficiary to determine that funding was used in an effective manner.

E. Technology Plan

We obtained an understanding of the Beneficiary's technology planning process and examined the applicable technology plan to ensure it met the criteria set forth in the Rules and reviewed documentation to ensure it was approved by an independent entity certified by USAC.

F. Reimbursement Process

We obtained and examined invoices submitted for reimbursement for services delivered to the Beneficiary and performed procedures to ensure that USAC was invoiced properly. Specifically, we reviewed invoices associated with the BEAR and SPI forms for services provided to the Beneficiary. We verified that the services claimed on the BEAR and SPI forms and corresponding service provider bills were

consistent with the terms and specifications of the service provider contracts or month-to-month agreements and eligible in accordance with the Schools and Libraries Program Eligible Services List.

Our audit finding, as well as the response to the finding, is provided below. We have evaluated the validity of the Beneficiary's response to our finding, and our position on the issue remains unchanged.

Finding #1
Failure to Comply with Competitive Bidding Requirements

Criteria

“Except as provided in [47 C.F.R.] §54.511(c), an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under [47 C.F.R.] §§ 54.502 and 54.503. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.” 47 C.F.R. § 54.504 (a) (2008).

“[The] FCC Form 471 shall be signed by the person authorized to order telecommunications and other supported services for the eligible school, library, or consortium and shall include that person’s certification under oath that: ...The entities listed on the FCC Form 471 application have complied with all applicable state and local laws regarding procurement of services for which support is being sought.” 47 C.F.R. § 54.504 (c)(1)(vi) (2008).

“All district personnel with purchasing authority should be familiar with the legal requirements for purchasing prescribed in Education Code Chapter 44.031 and Board of Education Policy CH’s. In addition, any employee involved in district financial transactions must read and understand Board Policy CAA (Local). Tomball ISD purchasing and acquisition must meet these legal requirements.” Tomball Independent School District’s *General Purchasing Procedures Manual*, at 2-1 (August 2008).

“[A]ll school district contracts, except contracts for the purchase of produce or vehicle fuel, valued at \$25,000 or more in the aggregate for each 12-month period shall be made by the method, of the following methods, that provides the best value for the district:

- (1) competitive bidding;
- (2) competitive sealed proposals;
- (3) a request for proposals, for services other than construction services;
- (4) a catalogue purchase as provided by Subchapter B, Chapter 2157, Government Code;
- (5) an interlocal contract;
- (6) a design/build contract;
- (7) a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager;
- (8) a job order contract for the minor construction, repair, rehabilitation, or alteration of a facility;
- (9) the reverse auction procedure as defined by Section 2155.062(d), Government Code; or

(10) the formation of a political subdivision corporation under Section 304.001, Local Government Code.” Texas Educ. Code Ann. § 44.031 (a) (Aug. 11, 2007).

“Notice of the time by when and place where the bids or proposals, or the responses to a request for qualifications, will be received and opened shall be published in the county in which the district's central administrative office is located, once a week for at least two weeks before the deadline for receiving bids, proposals, or responses to a request for qualifications. If there is not a newspaper in that county, the advertising shall be published in a newspaper in the county nearest the county seat of the county in which the district's central administrative office is located. In a two-step procurement process, the time and place where the second-step bids, proposals, or responses will be received are not required to be published separately.” Texas Educ. Code Ann. § 44.031 (g) (Aug. 11, 2007).

“Schools and libraries shall retain all documents related to the application for, receipt, and delivery of discounted telecommunications and other supported services for at least 5 years after the last day of service delivered in a particular Funding Year. Any other document that demonstrates compliance with the statutory or regulatory requirements for the schools and libraries mechanism shall be retained as well.” 47 C.F.R. § 54.516(a)(1) (2008).

“Schools, libraries, and service providers shall produce such records at the request of any representative (including any auditor) appointed by a state education department, the Administrator, the FCC, or any local, state or federal agency with jurisdiction over the entity.” 47 C.F.R. § 54.516 (b) (2008).

“Auditors must obtain sufficient, appropriate evidence to provide a reasonable basis for their findings and conclusions.” *Government Auditing Standards*, GAO-07-162G, ¶ 7.55 (2007 Revision, as amended).

Condition

IAD examined documentation to determine whether the competitive bidding process the Beneficiary used to select service providers for FRN 1808541 and FRN 1808544 complied with state and local procurement and competitive bidding requirements, as well as the FCC requirements, as required by the Rules. The Beneficiary did not provide documentation to support that the Texas Education Code requirements or the Beneficiary's *General Purchasing Procedures Manual* requirements concerning the procurement of services valued in excess of \$25,000 were complied with. Specifically, the Beneficiary did not provide documentation demonstrating that a notice of the time by when and place where the bids or proposals, or the responses to a request for qualifications, will be received and opened was published in the county in which the district's central administrative office is located, once a week for at least two weeks

before the deadline for receiving bids, proposals, or responses to a request for qualifications. The total undiscounted cost of services received and requested on the establishing FCC Form 470 for FRNs 1808541 and 1808544 were \$143,938 and \$36,000, respectively, which is greater than the \$25,000 threshold designated in the Texas Education Code.

IAD is required to conduct audits in accordance with GAGAS, which require auditors to obtain sufficient, appropriate evidence to substantiate audit findings and conclusions. Because adequate documentation was not provided concerning the public notice, bid opening, and award notifications for FRNs 1808541 and 1808544, IAD does not have reasonable confidence that the Beneficiary adhered to the applicable Texas state and local procurement and competitive bidding requirements as required by the Rules.

Cause

The Beneficiary did not demonstrate sufficient knowledge of the state and local procurement and competitive bidding requirements or the Rules. The Beneficiary also did not have adequate documentation or data retention policies and procedures to ensure that documentation demonstrating its compliance with the Rules was properly retained.

Effect

The monetary effect of this finding is \$69,692. This amount represents the total amount disbursed as summarized below:

FRN	Amount
1808541	\$ 53,132
1808544	\$ 16,560
Total	\$ 69,692

Recommendation

IAD recommends USAC management seek recovery of \$69,692. IAD also recommends the Beneficiary implement controls and procedures to ensure compliance with all applicable state and/or local procurement regulations as required by the Rules. IAD further recommends that the Beneficiary implement controls and procedures to ensure it retains adequate records to demonstrate compliance with the Rules for at least 5 years after the last day of service delivered in a particular Funding Year.

Beneficiary Response

Because this audit addresses the Beneficiary's compliance with USAC rules and regulations concerning two FRNs, we find it helpful to discuss the findings by specific FRN.

FRN 1808541: Tomball ISD has submitted to USAC evidence that the services covered by FRN 1808541 were purchased under a state master contract, and USAC has not disputed that claim. Tomball ISD believes that the IAD does not fully understand Texas Education Code Purchasing

Rules when it comes to selecting a state master contract. Specifically, USAC takes the position that the Texas Education Code requires certain competitive bidding procedures (including advisements in a local newspaper) when an applicant selects a State Master Contract as the winning bidder. This assumption is incorrect.

The Texas Education Code states that when selecting a State Master Contract, the school district is not required to comply with competitive bidding rules that would otherwise be in effect and has satisfied any state competitive bidding requirements (emphasis added):

<http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.791.htm>

Sec. 791.025. CONTRACTS FOR PURCHASES. (a) A local government, including a council of governments, may agree with another local government or with the state or a state agency, including the comptroller, to purchase goods and services.

(b) A local government, including a council of governments, may agree with another local government, including a nonprofit corporation that is created and operated to provide one or more governmental functions and services, or with the state or a state agency, including the comptroller, to purchase goods and any services reasonably required for the installation, operation, or maintenance of the goods. This subsection does not apply to services provided by firefighters, police officers, or emergency medical personnel.

(c) A local government that purchases goods and services under this section satisfies the requirement of the local government to seek competitive bids for the purchase of the goods and services.

(d) In this section, "council of governments" means a regional planning commission created under Chapter 391, Local Government Code.

Added by Acts 1991, 72nd Leg., ch. 38, Sec. 1, eff. Sept. 1, 1991.
Amended by Acts 1995, 74th Leg., ch. 28, Sec. 1, eff. April 27, 1995;
Acts 1997, 75th Leg., ch. 826, Sec. 1, eff. June 18, 1997.

USAC has also made the assertion, for FRN 1808541, that Tomball did not comply with document retention policies concerning some of the State-mandated competitive bidding rules that USAC **thought** applied to this FRN. Because these "state regulations" do not apply to this FRN, we disagree that Tomball is missing any documentation related to this FRN.

In conclusion, for FRN 1808541 we believe that USAC's finding that the applicant failed to provide public notice is misplaced and does not apply to the selection of a State Master Contract, and thus the 5 year document retention rule does not apply to documentation that was not required in the first place.

FRN 1808544: Tomball ISD does not dispute the finding that the district did not place an advertisement in the local newspaper for two consecutive weeks. We do not dispute the finding that this is required by the Texas Education Code. We do, however, believe that the level of this violation does not warrant the full recovery of funds. Aside from this "newspaper advertisement" requirement, the applicant did conduct a fair and open competitive bidding process. USAC has found no evidence of fraud or abuse, nor have they found any violation of Federal USAC rules. The applicant received multiple bids, evaluated them correctly, and awarded contracts within the proper time period. The "newspaper advertisement" requirement of the Texas Education Code simply requires the district to advertise when and where the bids would be opened. **No other details are required by this rule (no description of the project is required, nor is neither a scope of work, nor any other information concerning the project).** Absent evidence [of] other instances of competitive bidding violations, the Applicant's failure to provide the time and place of the bid openings in no way compromised the competitive bidding process, and should not require full repayment from the Applicant.

USAC IAD Response

FRN 1808541:

After presenting this audit finding to the Beneficiary, the Beneficiary informed IAD that the pre-existing service provider was part of a State Master Contract. IAD was unaware that the selected service provider was selected through a State Master Contract since the Beneficiary cited to its own FCC Form 470 on its FCC Form 471 rather than the State's FCC Form 470 that supports the State Master Contract.

The Beneficiary filed FCC Form 470 #970630000697405 for Funding Year 2009 and indicated in Block 2 that it was seeking "[t]ariffed or month-to-month services to be provided without a written contract" and "[s]ervices for which a new written contract is sought for the funding year in Item 2" for telecommunications and Internet access services. The Beneficiary did not receive any bids for the requested services for FRN 1808541 and decided to continue receiving services from the same service provider that provided the same services in the previous funding year. By posting an FCC Form 470 on USAC's website, the Beneficiary initiated a new competitive bidding process, and was required to comply with the Rules governing competitive bidding, in addition to the applicable state and local procurement requirements. *See* 47 C.F.R. §§ 54.504(a) and (c)(1)(vi) (2008).

Further, guidance on USAC's website regarding competitive bidding explains that "[i]f the applicant files an FCC Form 470 and considers a state master contract as one of the bids:

- The applicant must follow a competitive bidding process pursuant to FCC requirements and state and local procurement law. Price must be the primary factor - that is, it must be weighted more heavily than any other factor.
- If the applicant selects the state master contract as the most cost-effective alternative, the applicant is required to follow the applicable provisions of the state master contract, state contract law, and state and local procurement laws. The signed state master contract between the state and the service provider meets the FCC signed contract requirement.
- The applicant cites its own FCC Form 470 on its FCC Form 471.”¹

The Beneficiary did not provide any documentation to show that it conducted this bid evaluation process when it decided to procure the services through the State Master Contract.

In its response, the Beneficiary claims that it is not required to comply with the public notice requirements of Texas Educ. Code Ann § 44.031(g) because it sought services through the State Master Contract. While Tex. Gov. Code Ann. §791.025 (c) provides that “a local government that purchases goods and any services under [§ 791.025] satisfies the requirement of the local government to seek competitive bids for the purchase of goods and services,” here, the Beneficiary selected the State Master Contract after it had completed its own competitive bid process for Internet access services. In order for § 791.025 to apply to the current matter, the Beneficiary needed to use the State Master Contract for these services and cite to the state's FCC Form 470 instead of initiating a new competitive bidding process by filing its own FCC Form 470 for these services. Because the Beneficiary initiated a new competitive bidding process by filing its own FCC Form 470, and cited to its own FCC Form 470 on its FCC Form 471, instead of the state of Texas' FCC Form 470 that supported the State Master Contract, the Beneficiary was required to comply with the notice requirements under Texas Educ. Code § 44.031(g). The Beneficiary did not provide IAD with any documentation that would demonstrate that it complied with this notice requirement. Furthermore, the Applicant agrees that in regards to FRN 1808544 (discussed further below), that it failed to comply with the Texas state notice requirements. However, the Beneficiary used the same FCC Form 470 and the same competitive bid process for both FRNs and the notice requirement applies to both FRNs. Therefore, IAD cannot conclude that the Beneficiary adhered to the applicable Texas state and local procurement and competitive bidding requirements as required by the Rules.

¹ See USAC's website at: <http://www.usac.org/sl/applicants/step03/state-master-contracts.aspx>

FRN 1808544:

For FRN 1808544, the Beneficiary acknowledged that the notice requirements under Texas Educ. Code § 44.031(g) applied to the telecommunications services requested under this FRN. Further, the Beneficiary did not dispute the finding that it did not place an advertisement in the local newspaper for two consecutive weeks as required by the state procurement laws. However, the Beneficiary asserted that it conducted an otherwise fair and open competitive bidding process and that “the level of this violation does not warrant full recovery of funds.” The Beneficiary’s failure to comply with all applicable state and local laws regarding procurement of services for which support was sought is a violation of the FCC’s competitive bidding requirements. *See* 47 C.F.R. § 54.504(a) and 47 C.F.R. § 54.504 (c)(1)(vi) (2008). Pursuant to the *Fifth Report and Order*, “funds disbursed in violation of the statute or a rule that implements the statute or a substantive program goal must be recovered.” *In the Matter of Schools & Libraries Universal Service Support Mechanism*, Fifth Report Order and Order, CC Docket No. 02-6, FCC 04-190, ¶ 18 (2004). The *Fifth Report and Order* further states “we should recover the full amount for any funding requests in which the beneficiary failed to comply with the Commission’s competitive bidding requirements as set forth in section[s] [54.503,] 54.504 and 54.511 of our rules and amplified in related Commission orders.” *Id.* ¶ 21

For these reasons, our position on this finding remains unchanged.

USAC Management Response

The Rules require applicants to comply with their own state and local procurement requirements, in addition to the FCC’s competitive bidding requirements. *See* 47 C.F.R. §§ 54.504(a) and (c)(1)(vi) (2008). The Beneficiary did not dispute the finding that for FRN 1808544, it failed to place an advertisement in the local newspaper for two consecutive weeks as required under Texas Educ. Code § 44.031(g). However, the Beneficiary challenged the finding for FRN 1808541 and argued that the notice requirement under Texas Educ. Code § 44.031(g) did not apply for this FRN because the requested discounted services were ultimately procured through a State Master Contract. The Beneficiary filed its own FCC Form 470, rather than relying on the state’s FCC Form 470 for the underlying State Master Contract. The Beneficiary’s competitive bidding process was, therefore, subject to the notice requirements under Texas Educ. Code § 44.031(g) for contracts valued at over \$25,000. Further, under the FCC’s document retention requirements, the Beneficiary was required to retain documentation demonstrating its compliance with this notice requirement for at least five years from the last date of service for the relevant Funding Year. *See* 47 C.F.R. § 54.516(a)(1) (2008). *See also, Fifth Rep. & Order*, 19 FCC Rcd. at 15823-24, ¶¶ 47-50 (“[O]ur rules require both applicants and service providers to retain all records related to the application for, receipt and delivery of discounted services for a period of five years after the last day of service delivered for a particular Funding Year.”)

The Beneficiary did not provide any documentation to demonstrate that it complied with the notice requirement under Texas Educ. Code § 44.031(g), and, therefore, failed to demonstrate compliance with the applicable Texas state and local requirements as

required under the Rules. In accordance with FCC directives, USAC will seek recovery of \$69,692 identified by the auditors. USAC management concurs with the finding, effect, and recommendation.

This concludes the results of our audit. Certain information may have been omitted from this report concerning communications with USAC management or other officials and/or details about internal operating processes or investigations. This report is intended solely for the use of USAC, the Beneficiary, and the FCC and should not be used by those who have not agreed to the procedures and taken responsibility for the sufficiency of those procedures for their purposes. This report is not confidential and may be released to a requesting third party without restriction.

cc: Mr. D. Scott Barash, USAC Acting Chief Executive Officer
Mr. David Capozzi, USAC Acting General Counsel